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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., AND JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

BRIEF AMICUS CURIAE FOR BLACK HILLS VIDEO CORPORATION AND MIDWEST VIDEO CORPORATION

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STATEMENT[1]

These cases involve the validity of rules and regulations of the Federal Communications Commission governing the operation of community antenna television (CATV) systems. The matters in issue should be placed in proper perspective by reference to a description of the CATV industry, Commission rule making proceedings, and a description of the Rules and Regulations themselves.

A.

Background

CATV systems had their inception as a means of providing television signals to communities where normal television reception was poor or non-existent. In many such areas television signals could be received from antennas mounted on high towers or located on nearby hilltops, but persons not living in elevated areas or unable or unwilling to construct tall towers for receiving antennas were unable to receive these signals. In order to meet the desire of these people for television service, local entrepreneurs began building antennas at favorable receiving locations and installing cables carrying the signals throughout their communities,

[1] Black Hills Video Corporation and Midwest Video Corporation, hereinafter jointly referred to as "Black Hills," are interested in this proceeding because they operate CATV systems and a microwave company furnishing service to CATV systems. Their business operations are thus affected by the Commission's rules and regulations governing CATV operations. Pursuant to Section 402(a) of the Communications Act of 1934, as amended (47 USC § 402(a)), they have filed in the United States Court of Appeals for the Eighth Circuit Petitions to Review the validity of the Commission's CATV rules and regulations. Oral argument has been held in that case and the matter is under consideration by the Court.

For a fee individual connections to television sets from the cable were made. The antenna to which the television sets were connected by wire served as a single master antenna for many television sets in the community and made available television service that would have been otherwise available on an individual basis only at a very high cost, if at all. The first CATV systems began operation in 1949.[2]

The demand of the American public for more and better television service resulted in the growth of CATV service and the establishment of an entire new industry on the American scene. Early CATV systems were only able to provide their subscribers with the signals of a relatively few stations, generally not more than three stations, and even the ability to provide three signals was dependent upon the receiving antennas of CATV systems being near enough to television stations to be able to receive three signals directly off-the-air. Over a period of time, the technical equipment utilized by CATV systems improved and the number of television channels that could be distributed increased. Modern CATV systems can now receive and distribute to their subscribers on the channels of the CATV system's choice the signals of as many as 12 television stations.

Along with improvements in the technical capability of CATV systems came the ability to provide signals from stations too far distant from the CATV system to be received off-the-air. By the late 1950's, the Commission began licensing carriers to relay television

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[2] See Hearings on H.R. 7715, 89th Cong., before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, pp. 123-124.

signals by microwave, thereby making it possible for the residents of any community in the country with a CATV system to have as much choice of television programming as the residents of the larger cities. Even in the large cities, moreover, CATV systems have developed and grown because of the service they perform in eliminating shadowing and ghosting caused by the presence of tall buildings and in providing the good signal quality necessary for satisfactory color reception. Because of the service they perform, CATV systems have become an important means for the distribution of television signals.

B.

Proceedings at the Federal Communications Commission

At an early stage, the Commission took an interest in the development of CATV. On May 22, 1958, it initiated, in Docket No. 12443, a proceeding which it termed an "Inquiry into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV 'Repeaters' on the Orderly Development of Television Broadcasting", 23 Fed. Reg. 3746 (1958). On April 14, 1959, the Commission released a Report and Order in that proceeding, 18 Pike & Fischer RR 1573 (1959). In that Report and Order, the Commission concluded that it could find no present basis for asserting jurisdiction or authority over CATV systems except with respect to incidental radiations of energy pursuant to Part 15 of the Commission's Rules (*id.* at p. 1603). Furthermore, the Commission held that even in passing upon applications for microwave authorizations to deliver television signals to CATV systems, "it is neither proper, pertinent nor necessary . . . to consider the specific lawful use which the common

carrier subscriber may make of the facilities of the carrier." (*id.* at p. 1604).

However, shortly after releasing its Report and Order, the Commission, upon the petition of television station KWRB-TV in Riverton, Wyoming, designated for hearing applications for microwave facilities filed by Carter Mountain Transmission Corporation to deliver television signals to CATV systems operating in the service area of the Riverton station. One of the issues in the hearing was to determine the impact that a grant of the microwave would have on the operation of the television station and the resulting injury, if any, to the public served by it. After hearing, the Commission concluded that a grant of the microwave application would result in the demise of the Riverton station and that the need for a local television outlet and the service it would provide to outlying areas not served by CATV systems outweighed the need for the improved service the microwave station would furnish to the CATV systems. The microwave applications were denied, but "without prejudice however, to Carter's refiling when it is able to show that the CATV operation will avoid the duplication of KWRB-TV programming which now exists and that the CATV system will carry the local KWRB-TV signal." *Carter Mountain Transmission Corp.*, 22 Pike & Fischer RR 193, 194(e) and (f) (1962), *aff'd sub nom. Carter Mountain Transmission Corp.* v. *FCC,* 321 F. 2d 359 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 951 (1963). To the extent that this decision was inconsistent with the views expressed in Docket No. 12443, those views were modified.

Following its decision in *Carter Mountain* the Commission instituted rule making proceedings to regulate

CATV systems receiving their service by means of microwave facilities. This culminated in the *First Report and Order* released on April 23, 1965 (4 Pike & Fischer RR 2d. 1725). By this action the Commission adopted detailed rules and regulations prescribing for microwave-fed CATV systems the stations which they must carry and the non-duplication protection which had to be accorded to the various television stations.

On the same day that the Commission released its *First Report and Order*, it also released a *Notice of Inquiry and Notice of Proposed Rule Making* where for the first time it asserted that it believed it had authority to regulate all CATV systems, whether served off-the-air or by microwave. It appended to the Notice a Memorandum on its Jurisdiction and Authority, setting forth the basis for such jurisdiction and authority (4 Pike & Fischer RR 2d 1679 at 1707).

On March 8, 1966, the Commission released its *Second Report and Order* (A. 1-96).[3] In the *Second Report and Order*, the Commission asserted jurisdiction over all CATV systems and made its rules applicable to all CATV systems,[4] whether off-the-air or microwave-fed.

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[3] "A" refers to the printed Appendix filed in this Court under Rule 36(1).

[4] CATV systems serving fewer than 50 subscribers and apartment house master antennas were excluded from the operation of the Rules. See Rule 74.1101(a) (A. 77).

C.

The CATV Rules

The Commission's CATV rules are lengthy and detailed (A. 77-84, 127-131). The more important provisions thereof may be briefly summarized as follows:

1. Institution of CATV Service

No CATV system which commences operation after February 15, 1966 may initiate service without first giving notice of the name and address of the system, the communities to be served, the television signals to be distributed, and the estimated time operations will commence. The notice must be served on (a) the Commission, (b) the licensee or permittee of any television station within whose predicted Grade B contour it will operate, (c) the licensee or permittee of any 100 watt or higher power translator station operating in the community it will serve, and (d) where a CATV system proposes to carry the signal of a non-commercial educational television station beyond its Grade B contour into a community with an unoccupied television channel reserved for an educational station, the notice must also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area and state educational television agencies, if any.

Similar procedures must be followed whenever a CATV system, new or existing, proposes to add a new distant signal (*i.e.*, a signal of lower intensity than Grade B) to its operations.

2. The Carriage Rule

Every CATV system, new or existing, must upon appropriate request carry television stations in accordance with a system of priorities based upon signal strength.[5] The order of priorities is as follows:

(a) Stations providing a principal city grade signal

(b) Stations providing a Grade A signal

(c) Stations providing a Grade B signal

(d) 100 watt translators located in the community in question.

If the CATV system does not have enough capacity to carry all such stations, it must carry stations in strict accordance with the above priorities. No "distant" station (i.e., a station with a signal of less intensity than Grade B) may be carried until provision is made on the system for all television stations having higher priority.[6]

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[5] Different types of receiver antennas are needed to obtain satisfactory reception depending upon the strength of the television signal in question. In general, it may be said that a conventional indoor antenna is normally adequate to receive principal city grade signals or Grade A signals. A fairly routine type of rooftop antenna is satisfactory in most instances for the purposes of receiving Grade B signals. Distant signals—those beyond Grade B contour—are receivable in many instances by means of somewhat more sophisticated rooftop antennas, and this type of rooftop antenna is in use in many parts of the country enabling reception of signals from stations 80 to 100 miles away.

[6] An exception to the priorities is made when the station making the request for carriage substantially duplicates the programs of another station of equal or higher priority carried on the system and compliance with the request would require the deletion of the signal of an independent commercial television station or a noncommercial educational television station.

3. The Non-Duplication Rule

When two or more stations on the CATV system carry the same programs, the CATV system, upon receiving a request from a station of higher priority, must delete such programs broadcast by a station with a lower priority. Certain exceptions are provided for:

(a) Where the station with higher priority delays the broadcast of the program beyond the day on which it is originally broadcast.

(b) Where the station with higher priority broadcasts a program originated during prime time (generally 6:00 p.m. to 11:00 p.m.) at an hour outside of prime time.

(c) Where the station with higher priority transmits a color program in black and white and a station of lower priority transmits the program in color.

(d) Where the program in question is a live program in which time of presentation is of special significance.

(e) Notwithstanding the priorities, a CATV system is permitted to carry at all times the programs of two networks.

4. Procedure

A complicated procedure is established governing the right of CATV systems to commence operation. It varies depending on whether or not the CATV system is located within the Grade A contour of any television station situated within one of the top 100 markets.[7]

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[7] The largest 100 markets are the markets, as defined by the American Research Bureau, having the largest net weekly circulation. The American Research Bureau is engaged in the business of making television audience surveys for its clients. Its net weekly circulation figures are derived from these surveys.

(a) *For all markets*—Until the expiration of 30 days from the service of the notices described under item 1 above, no new CATV system can commence operation and no CATV, new or existing, can add a new distant signal. If during the 30-day period an objection is filed by any interested person, the stay is automatically continued until the Commission rules on the merits of the objection even though the proposed operation complies fully with Commission Rules and Regulations.

(b) *For top 100 markets*—A full evidentiary hearing is mandatory whenever a CATV system desires to import a distant signal. The requirement of a hearing may be waived upon appropriate showing.

(c) *Special relief in any market*—Any interested person may at any time file a formal petition or informal letter requesting the Commission to impose additional or different requirements from those set forth in the published rules and regulations. The Commission may grant temporary or interim relief pending a final ruling on the request for special relief.

5. Grandfather Rights

Any CATV system in operation on February 15, 1966 may continue operating. However, no existing CATV system can add a new distant signal without complying with the procedure prescribed for new systems. Moreover, carriage of distant signals in areas of geographical expansion of existing systems in the top 100 markets is restricted. Finally, all existing CATV systems in any market are subject to the special relief power with respect to Grade B as well as distant signals.

D.

The Instant Case

This case involves three CATV systems in San Diego, California each of which commenced operation prior to February 15, 1966. Each system carries the signals of Los Angeles stations as well as those of San Diego-Tijuana, Mexico. Petitioner Midwest Television Inc., licensee of VHF television station KFMB-TV, San Diego, initiated the proceeding by filing a petition with the Commission requesting special relief, both interim and permanent, against the expansion of the CATV systems insofar as the carriage of Los Angeles signals was concerned. The Commission on the basis of the pleadings filed by the parties concluded (A. 161) that the pleadings "presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area." The Commission granted interim relief by forbidding the CATV systems to expand into new geographical areas not served on or before February 15, 1966 unless the service in such new areas was limited to carriage of signals from stations located in the San Diego area.[8] New subscribers could be added in geographical areas served by the CATV system prior to February 15, 1966 and in these latter areas the CATV systems could carry Los Angeles as well as San Diego stations. In arriving at this determination the Commission resolved the dispute between the parties as to whether the Los Angeles signals were Grade B or distant by assuming that the signals were in fact of Grade B quality (A. 165). A hearing was ordered on the

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[8] Included within such area are the stations located in Tijuana, Mexico.

matter of a final order but the interim relief remained in effect pending the hearing.[9]

The CATV systems petitioned the Court below to review and set aside the interim relief ordered by the Commission. The Court held that the Commission lacked the authority to grant the interim relief.

SUMMARY OF ARGUMENT

I.

The Commission lacks statutory authority to regulate CATV systems. The Commission must derive any jurisdiction it has either from Title II or Title III of the Communications Act of 1934 (47 USC § 151 et seq.). *Regents of Georgia* v. *Carroll,* 338 U.S. 586 (1950). Title II is concerned with common carriers and is not applicable to CATV since even the Commission concedes CATV does not constitute common carrier activity, *Philadelphia Television Broadcasting Co.* v. *Rollins Broadcasting Inc.,* 5 Pike & Fischer RR 2d 677 (1965), *aff'd sub nom. Philadelphia Television Broadcasting Co.* v. *FCC,* 359 F. 2d 282 (D.C. Cir. 1966).

The Commission relies on Section 3(a) of the Communications Act (47 USC § 153(a)) defining "communication by wire" and on Section 2 (47 USC § 152) which makes the provisions of the Act applicable to all interstate communication by wire or radio to bring CATV under its Title III functions. This reliance is misplaced. The structure of the Communications Act and its legislative history demonstrate that the Federal

[9] Although an Initial Decision has been issued by the Hearing Examiner in the hearing case, the Commission itself has as yet not issued its decision. Meanwhile it adheres to the interim order first issued in July, 1966.

Communications Commission derived its Title III powers from the Radio Act of 1927 (47 USC §§ 81 et seq.) which did not apply to "communication by wire". The Federal Communications Commission's Title II jurisdiction was taken over from the Interstate Commerce Commission which had no Title III powers. In the new Act the Federal Communications Commission was given no Title III powers over communication by wire.

Nor can the Commission's jurisdiction be founded on Section 3(b) (47 USC § 153(b)), defining "radio communication". The Commission did not rely on that section in adopting its rules and regulations and cannot advance it here. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947). But the objection to reliance on Section 3(a) is more fundamental than *Chenery*. The powers of the Commission under Title III are limited to regulation of radio transmission alone. This is explicitly so stated in Section 301 of the Communications Act (47 USC § 301) and was so understood by Congress in enacting the Radio Act of 1927, the predecessor of Title III. See *National Broadcasting Co.* v. *U. S.*, 319 U.S. 190, 210-213 (1943).

The specific statutory provisions in Title III relied upon by the Commission confer no jurisdiction over reception. Sections 4(i) and 303(r) (47 USC §§ 154(i) and 303(r)) are general in nature and confer no independent power. *Regents of Georgia* v. *Carroll*, 338 U.S. 586, 600 (1950). Section 303(f) (47 USC § 303 (f)) authorizes rules and regulations designed to prevent interference among stations, Section 303(h) (47 USC § 303(h)) authorizes the Commission to prescribe the areas or zones to be served by stations, and Section 307(b) (47 USC § 307(b)) directs the Commission to

make an equitable allocation of radio services among the several states and communities. These powers all relate to radio transmission.

In the past the Commission has recognized that it had no jurisdiction over reception. It expressly so held in 1959 with respect to CATV. *Inquiry Into Impact of CATV,* 18 Pike & Fischer RR 1573 (1959). In 1962 it took the same position when it asked Congress to adopt the All Channel Receiver Law—Sections 303 (s) and 330 (47 USC §§ 303(s) and 330).

II.

The Regulations involved in this case establish a licensing system which is not provided for by the Act. Although the regulations themselves do not contain the word "license", their structure is such that Federal Communications Commission permission is necessary for CATV systems to commence operation. The necessity for requesting and obtaining permission is "licensing" as defined by Section 2(e) of the Administrative Procedure Act. 5 USC § 1001(e). In the case of radio transmission, the Communications Act specifically requires a license and prescribes the standards and procedure which should govern Commission action. Congress should not be presumed to have granted licensing power over a communications medium without a clear and specific directive to that effect. *Cf. Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58 (1963); see also *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Company,* 289 U.S. 266 (1933); *National Broadcasting Co.* v. *U.S.,* 319 U.S. 190 (1943).

III.

There is a third and independent ground for upsetting the Commission's action. It relates to Rule 74.1109

under which this case arose. That Rule provides that notwithstanding any other rule the Commission may upon request of any interested person "waive any provision of the Rules" or may "impose additional or different requirements." The existence of such a rule renders rule making nugatory. It amounts to a declaration by the Commission that it can promulgate a rule which simply states that no CATV operation can be commenced or carried on except pursuant to a determination by the Commission on a case-by-case basis in ruling upon requests of interested persons for special relief. The ambit of the special relief requested is limitless. If Congress attempted to delegate administrative authority to an agency with such loose standards serious constitutional doubt would attach to the action. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935). The Commission has arrogated such a power to itself without Congressional action.

ARGUMENT

The Commission by its *Second Report and Order* has adopted a comprehensive set of regulations governing all aspects of CATV operations.[10] These rules prescribe the conditions under which persons may initiate

[10] Although the Commission's *Second Report and Order* is applicable to both microwave-fed and off-the-air CATV systems, the three CATV systems involved in this proceeding are all off-the-air systems. The horrendous consequences conjured up by the government (Br. 34-35) and Midwest Television Inc. (Br. 32-33) which would result from importation of New York and Los Angeles signals to cities throughout the country are irrelevant to this case. Such importation can take place only if the Commission grants a microwave application for that purpose. Such is not the situation in the instant case where no radio authorization is required. The signals carried on the CATV systems are captured directly off-the-air in the same manner as is done by conventional receiving antennas.

CATV service or expand existing operations; they govern the signals which must be carried by the CATV systems and those whose carriage is prohibited; they establish a detailed system of priorities which require CATV systems to black-out programs of certain stations in order to protect the economic interests of other stations; they formulate rules of procedure governing the administration of the regulatory system; etc. Then the Commission adds a catch-all Rule 74.1109 which in essence provides that notwithstanding any other provisions of the rules the Commission may upon request of any interested person "waive any provision of the rules" or "impose additional or different requirements". The special procedure is invoked by the filing of a formal complaint or by informal letter. Persons affected by the request for special relief are permitted to file responsive pleadings. The Commission reserves to itself the right to grant or deny the relief requested with or without a hearing and if a hearing is ordered to provide for interim relief on the basis of the pleading. The interim relief granted in this case is bottomed on Rule 74.1109.

Black Hills urges that Rule 74.1109 is a shocking abuse of administrative power. Whatever statutory authority has been conferred upon the Commission to promulgate rules and regulations governing CATV activity, it cannot serve as a valid base for a rule like § 74.1109. A rule which reserves to an administrative agency the choice of arbitrary action which is implicit in Rule 74.1109 makes a mockery of administrative law. The Court can, therefore, summarily reverse the Commission's action in this case and sustain the ruling of the Court below because of the infirmities of Rule 74.1109 without considering the more wide reaching questions concerning the scope of Commission author-

ity under the Communications Act with respect to CATV activities. However, since the Court in granting certiorari did not limit its consideration to Rule 74.1109, Black Hills will address itself to all aspects of the case.

I.

THE COMMUNICATIONS ACT PRECLUDES COMMISSION ACTION IN THE CATV FIELD

Petitioners devote most of their briefs to a description of what they regard as the evils of CATV on the premise that if there is a problem in the communications field in need of remedy, the Commission has plenary authority to prescribe the remedy. This theory is stated in almost so many terms at the outset of the government's Brief as follows (p. 28):

> "Once the nature of CATV and its potential impact on broadcasting is comprehended, it is virtually self-evident that the administrative agency charged by Congress with the regulation of broadcasting, and endowed with sweeping authority to perform that function, has jurisdiction to regulate this new and significant development in the communications field."

The government's position overlooks the fact that as an administrative agency it is empowered to exercise only that authority which has been committed to it by Congress. An administrative agency must find its powers within the compass of the authority given it by Congress. *Regents of Georgia* v. *Carroll,* 338 U.S. 586 (1950). The Communications Act of 1934, as amended, (47 U.S.C. § 151 et seq.) is the statute which creates the Commission and sets forth its powers and functions.

The Communications Act of 1934 resulted from the efforts of Congress to create an administrative agency

with regulatory power over electrical communication. To accomplish this result, the functions which the Interstate Commerce Commission formerly performed under its Act with respect to communications common carriers were transferred to the FCC and the provisions of the Interstate Commerce Act on this subject became, with modifications, Title II of the Communications Act.[11] The functions with respect to radio had formerly been discharged by the Federal Radio Commission under the Radio Act of 1927 (47 USC §§ 81 et seq.). This Act with some modifications became Title III of the Communications Act and the Federal Radio Commission was abolished.

If the Commission has any authority over CATV operations, it must come from either Title II or Title III of the Communications Act; the other Titles of the Act do not endow the Commission with substantive authority. Title II has no applicability to CATV since even the Commission has admitted that CATV operations do not constitute common carrier activities under the Act.[12] The Commission relies upon Title III for

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[11] Certain limited authority over communications common carriers was formerly exercised by the Postmaster General and was also transferred to the Commission by the Communications Act of 1934 (See 47 USC § 601(b)).

[12] *Philadelphia Television Broadcasting Co.* v. *Rollins Broadcasting, Inc.*, 5 Pike & Fischer RR 2d 677 (1965), *aff'd sub nom.*, *Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F. 2d 282 (D.C. Cir. 1966). The government (Br. 47, n. 36) has attempted to construe this decision as upholding "as rational and permissible the Commission's determination to regulate CATV systems as adjuncts of the country's broadcasting system rather than as common carriers . . .". This is not at all the holding of the case. The Court made it quite clear (359 F. 2d at p. 284, n. 5):

> "We of course do not pass judgment on the validity of the broad jurisdictional base asserted by the Commission in . . . the recently issued rules with respect to all CATV systems."

its authority to enter the CATV field, its syllogism being as follows (government's Br. 29):

1. Section 2 of the Communications Act (47 U.S.C. §152) states that the Act is applicable to "all interstate . . . communication by wire or radio . . . and to all persons engaged . . . in such communication."

2. Section 3(a) of the Communications Act (47 U.S.C. §153(a) defines "wire communication" or "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." The Commission holds that CATV operations are clearly "communication by wire" within the above definition.[18]

3. Since CATV constitutes "communication by wire" and since Section 2 provides that the Act shall be applicable to all persons engaged in "communication by wire", the Commission can under Sections 4(i) and 303(f) and (r) of the Communications Act (47 U.S.C. §§ 154(i), 303(f) and 303(r)) promulgate such rules and regulations as are necessary to carry out the provisions of the Act, including Section 303(h) (47 U.S.C. § 303(h)) which authorizes the Commission to establish areas or

[18] The Commission also states (*Second Report and Order*, Appendix C, n. 1, A. 70) that it can be argued that CATV operations are also "radio communication" as defined in Section 3(b) of the Communications Act (47 U.S.C. § 153(b)). However, the *Second Report and Order* relied only upon Section 3(a) to justify Commission jurisdiction.

> zones to be served by stations and Section 307(b) (47 U.S.C. § 307(b)) which directs the Commission to make an equitable allocation of radio facilities amongst the several states and communities. It is the Commission's position that unfettered CATV operations interfere with the allocations which it has previously established pursuant to Section 303(h) and 307(b) of the Act and their operations must be regulated so that the purposes of Sections 303(h) and 307(b) are effectuated.

The argument distorts the basic structure of the Communications Act and ignores its legislative history. As has previously been pointed out, two disparate functions were transferred to the Federal Communications Commission when it was created by the Communications Act of 1934. One of its functions came from the Radio Act of 1927. Under that Act, the Federal Radio Commission performed essentially the same functions with respect to radio as the Federal Communications Commission is authorized to exercise under Title III of the Communications Act. This included the powers contained in Sections 4(i), 303(f), 303(h), 303(r) and 307(b) of the Communications Act. The Radio Act of 1927 contained a definition of "radio communication" in Section 31 (47 U.S.C. § 111) which is essentially the same as Section 3(b) now contained in the Communications Act. However, the Radio Act of 1927 contained no definition of "communication by wire" similar to Section 3(a) upon which the Commission now relies. It is thus clear that had the Federal Radio Commission attempted to promulgate rules and regulations under the Radio Act of 1927 regulating CATV activities, it could have found no statutory basis for such conduct; at least the Federal Radio Commission could not have

relied upon the statutory basis which the Federal Communications Commission chooses.

The presence of Sections 2(a) and 3(a) in the Communications Act does not enable the Commission to use Title III powers with respect to non-carriers. Section 3(a) is derived from Section 1(3) of the Interstate Commerce Act (41 Stat. 475) which related only to activities of common carriers. It has the same purpose in the Communications Act. It is true that Section 2(a) declares that the provisions of the Communications Act shall apply to *all* interstate and foreign communication by wire. However, contrary to the implications of the Commission's position this does not mean that *all* provisions of the Communications Act are applicable to *all* interstate communication by wire. On the contrary, it is quite clear from a study of Title II that its provisions are applicable to interstate communication by wire only when common carriers are involved and the complete silence of Title III as to communication by wire evinces a design to exclude such activity from the operation of Title III. This, however, does not mean that there are no provisions of the Communications Act which are applicable to non-common carrier communications by wire. For example, Section 605 in Title VI is applicable to all interstate communication by wire whether or not common carriers are involved.

The foregoing is a reasonable reading of the various provisions of the Communications Act. The Commission's position is strained. If its point of view were accepted, it would mean, for example, that the Commission could exercise Title III power over Muzak operations—i.e., the business of furnishing music by wire to subscribers—or STV operations—the origina-

tion of television programs by an organization which distributes them by wire to subscribers.[14] Under the Commission's reasoning it could regulate such activities under Title III if it could find that they threatened the economic health of broadcast operations because such activities are clearly communications by wire within the meaning of Section 3(a) and are probably interstate in character.

The Muzak and STV analogies are no more far fetched than is Commission reliance upon Sections 2(a) and 3(a) for the purpose of jusitfying Commission regulation of CATV. The short answer is that Section 2(a) does not confer upon the Commission all of the power contained in the Communications Act. Consistent with the declaration of Section 2(a) communications by wire activities which are not common carrier in nature can be declared to be not within the ambit of Commission regulatory power and still be subject to other provisions of the Communications Act —e.g. Section 605.

The clear intent of the Communications Act is underscored by its legislative history. The Senate Committee Report (Senate Report No. 781, 73rd Cong.) accompanying the report of that bill to the Senate, set forth (p. 3) that Title II for the most part "follows the provisions of the Interstate Commerce Act now applicable to communications or adapts some provisions of that Act now applicable only to transportation." As to Title III, it stated that it (p. 6):

> "... consists of the Radio Act of 1927 written to bring into a single title effective provisions of that

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[14] See *Weaver* v. *Jordan*, 49 Cal. Rptr. 537, 411 P. 2d 289 (1966), *cert. denied*, 385 U.S. 844 (1966).

> Act and its several amendments. The language has been changed in minor respects to conform to the terms and definitions in the remainder of the bill." [15]

The Conference Committee, in resolving the differences between the two bills, stated as to Title III (Conference Report on Communications Act of 1934, House Report No. 1918, 73rd Cong., p. 47):

> "The Senate bill abolishes the Federal Radio Commission, and repeals the Radio Act of 1927, but in effect reenacts it in Title III, eliminating certain matter no longer effective, and adding certain provisions, most of which are taken from H.R. 7716, 72nd Congress, which passed both houses but was pocket vetoed. Title III of the House bill abolishes the Federal Radio Commission but transfers its functions under the Radio Act of 1927 to the new Commission. Title III of the substitute adopts the provisions of the Senate bill, except that most of the changes from existing law which were not contained in H.R. 7716 have been omitted."

It is thus clear that when Congress enacted the Communications Act it manifestly intended the Federal Communications Commission to perform under Title II of the Act those functions which were formerly performed by the Interstate Commerce Commission under its Act and its Title III functions were to be those which had been performed by the Federal Radio Commission under the Radio Act of 1927. There is

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[15] In the House bill the Senate language with respect to the purpose of Title II is repeated (House Report No. 1850, 73rd Cong., p. 5). Title III as it appeared in the House bill consisted of a single section which abolished the Federal Radio Commission and transferred its functions under the Radio Act of 1927 to the Federal Communications Commission.

not a single word in the legislative history which indicated that the Federal Communications Commission was intended to be given Title III functions with respect to communication by wire. Commission reliance on Sections 2(a) and 3(a) for assertion of Title III powers over CATV is therefore without foundation.

Nor can the Commission's CATV rules be justified by reference to Section 3(b) of the Communications Act containing a definition of "radio communication". The short answer to any such argument is that the Commission has expressly declined to bottom its jurisdiction on that statutory ground; it cannot attempt to do so for the first time in this Court. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947). But the objection to such an assertion of jurisdiction by the Commission is more fundamental than reliance upon *Chenery*. As is readily apparent from the description of CATV operation, it is a reception service and not a radio transmission service. The whole thrust of the Radio Act of 1927 and Title III of the Communications Act of 1934 was to confer on the Federal Radio Commission and the Federal Communications Commission authority over transmission aspects of radio communication but not over reception. Section 301 of the Communications Act (47 U.S.C. § 301) defining the scope of Title III of the Communications Act, makes this abundantly clear when it states:

> "It is the purpose of this Act, among other things, to maintain the control of the United States over all channels of interstate and foreign *radio transmission,* and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. . . . (emphasis added)"

The reason for this concern is quite simple; it is found in the history of radio regulation prior to the Radio Act of 1927. An excellent summary of the conditions which made that Act necessary is set forth in *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 210-213 (1943). That opinion makes it clear that the Radio Act of 1927 was necessary because previous authority was inadequate to deal with the subject of radio transmission. Radio regulation began with a simple statute, the Wireless Ship Act of 1910, 36 Stat. 629, Chapter 379. That Act required certain vessels to be equipped with apparatus for radio communication. In 1912, Congress enacted the Radio Act of 1912 (37 Stat. 302, Chapter 287) which required the operation of such apparatus to be conducted pursuant to a license from the Secretary of Commerce. No additional legislation was enacted until 1927. In the interim, broadcasting appeared on the scene and the demand for frequencies mushroomed. The existing legislation was inadequate to prevent the Secretary of Commerce from denying licenses to qualified applicants merely because interference would be caused to other stations or to permit him to confine a licensee to the frequency originally assigned him. Under the old law, once an applicant was assigned a frequency he was free to shift to another one if he liked it better. The inevitable result was chaos in the spectrum. The Radio Act of 1927 was passed to relieve this chaos by creating adequate authority over radio transmission. This is the authority which was granted to the Federal Radio Commission by the Radio Act of 1927 and this was the authority which Title III of the Communications Act gave to the Federal Communications Commission.

There is nothing in any of the specific statutory provisions relied upon by the Commission as the basis for its authority which indicates that the Commission's Title III authority extended to anything but regulation of transmission. Sections 4(i) and 303(r) give the Commission broad rule making authority to carry out the provisions of the Act. In and of themselves, they confer no independent power; they are dependent upon other substantive provisions. As this Court stated in *Regents of Georgia* v. *Carroll*, 338 U.S. 586, 600 (1950):

> "Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. It is in connection with this power that Section 303(r) is to be interpreted."

Section 303(f) authorizes the Commission to promulgate rules and regulations designed to prevent interference among stations. This section clearly relates to transmission alone. There is nothing whatsoever in the activities of CATV that directly or indirectly causes any interference among stations and the Commission does not claim that such is the case.[16] Section 303(h) authorizes the Commission to establish areas or zones to be served by stations. Again, the subject matter is clearly transmission. Without such authority it could be argued that the Commission lacked power to permit some stations to use relatively little power and other stations to use maximum power. Also without such a provision existing radio stations in opera-

[16] CATV systems like other wire services and radio and television receivers do emit a certain amount of radiation which can cause interference to radio service. In this aspect of their operations they are miniature transmitters and are subject to FCC jurisdiction. The Commission has promulgated Part 15 of its Rules to govern the transmission by such devices.

tion could justifiably argue that no new station causing any interference to such operation could be granted without a hearing since such interference would constitute a modification of license. However, since the Commission under Section 303(h) is authorized to prescribe the areas or zones to be served by a station, it is clear that once the Commission exercises this authority, existing stations cannot complain with respect to licensing of new stations which cause interference in an area outside that prescribed as the area served by that station.[17]

The last section relied upon by the Commission is Section 307(b). This section reads as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same."

By its terms the operation of this section is confined to transmission. It directs the Commission, when it considers applications for licenses and modifications and renewals thereof, to provide a fair, efficient and equitable distribution of radio services to the several communities. In other words, Section 307(b) makes it clear that when conflicting demands exist for frequencies, the Commission is required to make an equitable allocation among the several communities.

The legislative history of Sections 303(h) and 307(b) confirms the Congressional purpose in confer-

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[17] Cf. *FCC* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943).

ring power only over transmission. These sections came to Title III from the Radio Act of 1927. In the course of the hearings held during 1926 before the House Committee on Merchant Marine and Fisheries on one of the bills (H.R. 5589, 69th Cong.) which later became the Radio Act of 1927, Stephen B. Davis, Solicitor of Commerce, explained to the Committee the provisions of this bill. In the course of this explanation, the following colloquy took place (pp. 130-131):

> "Mr. Briggs: It would not be the policy of your department to in any way allow any discrimination against the small independent broadcast stations in favor of the big, high powered stations?
>
> "Mr. Davis: Absolutely not. We recognize that there are, you may say, two very distinct fields in radio—there is the very broad national field, or, at least, the field covering large zones, or districts, where obviously, in order to give the proper service, you must have powerful stations. There is, at the same time, the field for the local station, the station which only aims to take care of the radio service within a limited zone. Both are equally important and both will receive like protection."

Subsequently, in the debate on the House floor on H.R. 9971, (a later version of H.R. 5589), Congressman White of Maine, who introduced both H.R. 5589 and H.R. 9971, cast further light on Congressional purpose (67 Cong. Rec. 5479):

> "Existing law gives the Secretary no control over the location of stations. The result has been an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago 40 stations, of New York 38, of Philadelphia 22. Stations so centered detract from the value of each other and interfere with the highest quality of

service. In the bill before you the Secretary is given authority in passing upon a license to consider its proposed location and the area to be served thereby, and he is enjoined to effect an equitable geographic distribution of stations over the entire country."

From the foregoing, it is clear both as a matter of construction of the plain words of the statute and a study of the legislative history that Congress intended to restrict Commission authority under Title III to regulation of transmission, not reception. Prior to the instant incursion by the Commission into the CATV field, the Commission itself has been forthright in denying its jurisdiction over reception matters. Only eight years ago it disclaimed jurisdiction over CATV. *Inquiry Into Impact of CATV*, 18 Pike & Fischer RR 1573 (1959). Moreover, in 1962, Congress passed the All Channel Receiver Law, P.L. 87-529, 76 Stat. 150 (1962) which added Sections 303(s) and 330 to the Communications Act. These provisions authorized the Commission to require that any television receiving apparatus shipped in interstate commerce be capable of receiving all frequencies allocated by the Commission to television broadcasting. This is the first instance where Congress included in Title III authority with respect to reception facilities. By the same logic which the present Commission utilizes to argue that Sections 303(h) and 307(b) authorize it to regulate reception facilities involved in CATV, it could have argued in 1962 that Section 303(g) of the Communications Act (47 U.S.C. § 303(g)) enabled it under Title III to control the subject of all-channel receivers without the necessity of enabling legislation. Section 303 (g) authorizes the Commission to promote the larger and more effective use of radio in the public interest.

One can hear the argument made by the present Commission that the usefulness of UHF—certainly a large and important part of the radio spectrum which should be utilized in the public interest—was being undermined by the fact that many receivers being shipped in interstate commerce were not equipped to receive UHF and hence, a large part of the television spectrum was lying fallow. Television receivers are as much an instrumentality of communication by radio as is CATV and could by the logic utilized in this case be subjected to Commission control without legislation. However, the Commission at that time recognized that its authority over reception devices was inadequate, and in requesting the All Channel Receiver Law, the Commission candidly stated to the Congress (Hearings on H.R. 8031 before the House Committee on Interstate and Foreign Commerce, 87th Cong., pp. 7-8 (1962)):

> "In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities. . . ."

The Congress obviously agreed with the Commission as to lack of authority over reception for it proceeded to enact the All Channel Receiver Law rather than advising the Commission that it had the authority under then existing law to deal with the subject.

The Commission was obviously right in 1962 in asking Congress for a specific grant of authority to deal

with the subject of reception. The Commission has requested the Congress on several occasions to give it authority to deal with the subject of CATV.[18] To date, Congress has refused to do so. Yet now, the Commission by its own *ipse dixit* says that such Congressional authority is not necessary; it has ample authority under Title III of the Communications Act to deal with the subject of CATV. This is a straight usurpation of authority.

II.

THERE IS NO STATUTORY AUTHORITY FOR THE SPECIFIC CATV REGULATIONS ADOPTED BY THE COMMISSION

A. Description of the Rules

The specific CATV rules and regulations which are involved in this proceeding are Sections 74.1105, 74.1107 and 74.1109.[19] Rule 74.1109 will be dealt with separately under Point III. Rules 74.1105 and 74.1107 prescribe a detailed procedure which must be adhered to by all CATV systems, "existing" as well as "new". The dividing line between "existing" and "new" depends on whether or not the system was in operation on February 15, 1966—the date upon which the Com-

[18] For the latest instance see H.R. 13286 and S. 3017, both 89th Cong. See also H.R. 11041 and S. 2653, both 86th Cong.

[19] There are also other CATV regulations governing such subjects as the television stations which must be carried by CATV systems, those which the CATV systems are forbidden to carry; and the non-duplication protection which CATV systems must accord to local stations as against distant stations. Black Hills has argued in its Eighth Circuit case that these regulations are invalid because they lack statutory authority and contravene the provisions of the First Amendment to the Constitution. These other regulations are not specifically involved in the instant case.

mission announced its intention to adopt specific rules and regulations governing all CATV systems. These rules and regulations were adopted and issued in March, 1966 as part of the *Second Report and Order*.

So far as new CATV systems are concerned, Rules 74.1105 and 74.1107 provide that before any such system can commence operation it must serve notice at least 30 days before it expects to commence operation on (1) the Federal Communications Commission; (2) all television stations within whose predicted Grade B contour the system will operate, (3) all 100-watt translators operating in the community where the CATV system will operate, and (4) the Superintendent of Schools in the community and county in which the system will operate and the local, area and state educational television agencies—in those situations where the CATV system proposes to carry distant non-commercial educational television stations.

As a minimum matter, the CATV system is prohibited from commencing operation during this 30-day period. But that is not all. If the CATV system operates within the predicted Grade A contour of any television station located in one of the top 100 television markets as defined by ARB (a private organization), the CATV system is not allowed to commence operation so far as importation of distant signals is concerned until it obtains formal FCC permission for that purpose either by going through a full evidentiary hearing or obtaining a waiver of such a hearing as the result of a detailed showing in a petition as to why the public interest would be served by dispensing with a hearing. Even in the case of non top 100 markets or in the case of Grade B signals for top 100 market stations, any party in interest may during the 30-day

waiting period file a written objection to the proposed operation. The filing of such an objection, no matter how frivolous or unsubstantiated, automatically prevents the CATV system from commencing operation until after the Federal Communications Commission enters a formal order disposing of the objection and giving its permission for the operation. The Commission may enter such an order on the basis of the pleadings or may set the matter for hearing.

So far as existing CATV systems are concerned, Rule 74.1105(d) purports to give them grandfather rights so that no new FCC authorization is necessary for existing systems to continue their existing operation. However, if any existing system desires to add a new distant signal, it must go through the same procedure as does a new system:—30 days' notice and a hearing or waiver if a top 100 market situation is involved or for a non 100 market situation, a 30-day pause plus an automatic stay if an objection is filed.

B. The Rules Prescribe a Licensing System Without Statutory Authority

The Commission procedure is the equivalent of a licensing system. The essence of a licensing system is the need of government permission before an activity is commenced. It is not important that the Commissions's rules and regulations do not contain the word "license"; it is the effect of the rules which governs. Normally, a person may enter a business activity merely by starting operation. In the case of CATV, however, the Commission's rules prescribe detailed procedures which must be adhered to in order to qualify for the right to operate. The procedure is not only time consuming; it is not automatic. The right to com-

mence operation at all depends upon the CATV system saitsfying the Commission's procedure. This is licensing pure and simple. Section 2(e) of the Administrative Procedure Act, 5 U.S.C. § 1001(e) recognizes that labels are not controlling when it defines "license" or "licensing" as follows:

> "'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."

The necessity of having to operate a business pursuant to governmental permission is not lightly to be presumed. *Cf. Bantam Books Inc.* v. *Sullivan,* 372 U.S. 58 (1963). Normally, a person is free to enter any business he chooses without obtaining prior permission from the Federal Government. Indeed, when the business is associated with the communications media, a licensing system is contrary to the First Amendment to the Constitution unless there are unique conditions such as those which obtain in radio where there would be only chaos without licensing, so that the very existence of the licensing is a *sine qua non* to the existence of the medium at all. *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Company,* 289 U.S. 266 (1933); *National Broadcasting Company* v. *U.S.,* 319 U.S. 190 (1943).

In the case of radio, Congress did not leave any room for doubt as to its intentions concerning licensing. It specifically set forth in Section 301 the directive

that operation of radio apparatus for the purpose of radio transmission shall be only "under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." Moreover, it established detailed statutory standards and procedures governing the granting and denying of such licenses.[20]

No such provision is contained in the Act with respect to CATV. The statute gives the Commission no authority to prescribe a licensing system and does not set forth standards to govern such licenses or the procedure to be followed in acting upon applications for such a license. The Commission has arrogated to itself a function which Congress has withheld from it. Its rules establish a licensing system and establish a procedure in acting upon applications for such license which reserve to it full flexibility as to the procedure it should follow. Thus, while in the case of broadcast licenses, even Congress has not required the Commission to order an automatic evidentiary hearing in every single instance, the Commission on the face of its rules has decreed that a hearing is required in every single instance of top 100 market applications. But it then reserves the right to waive even this hard and fast procedure. Moreover, while Congress has specifically provided that no applica-

[20] Even in Title II common carrier matters (where no First Amendment problem is present) the Congress was very explicit when it desired prior government approval for an activity. Thus in Section 214 (47 U.S.C. § 214) it specifically provided that "[n]o carrier shall undertake the construction of a new line or of an extension of any line . . . unless and until there shall first have been obtained from the Commission a certificate. . . ." Detailed provisions are contained in the statute governing the manner in which the Commission shall exercise its authority.

tion for a radio station license should be denied without a full hearing, the Commission, in the case of CATV, has not bound itself to accord any hearing rights to the CATV applicant. Finally, Congress in the case of radio authorization has provided that no license may be modified or revoked without a hearing. The Commission in the CATV field recognizes no such limitations. It has without hearing or formal procedure purported to terminate the authority of CATV systems which commenced operation between February 15, 1966 and March 17, 1966—the date of publication in the Federal Register and the earliest date upon which the CATV rules became effective. Before March 17, 1966 such operation was legal in all respects—even the Commission does not contest the point. After March 17, 1966 the Commission by *ipse dixit* has declared continued operation illegal. The Commission has even purported to exercise such authority—again without a hearing—with respect to the continued carriage of Grade B signals even where the initiation of such carriage was pursuant to an earlier finding by the Commission that the carriage was consistent with Commission rules. *Buckeye Cablevision, Inc.*, 11 Pike & Fischer RR 2d 885 (1967).

Black Hills is not seeking "due process" procedure for CATV applications. The error of the Commission's action would not be cured by a complicated hearing procedure. The point is that the absence of a statutory procedure is indicative of Congressional purpose. The answer is clear. When Congress desired the Commission to have licensing authority, it said so clearly and unequivocally and provided the standards and procedure to govern its action. It has not done so in the case of CATV.

III.

RULE 74.1109 IS AN ADMINISTRATIVE MONSTROSITY

Rule 74.1109 provides that not withstanding any other provision of the rules, the Commission may upon the request of any interested person "waive any provision of the rules relating to distribution of television broadcast signals by CATV systems" or "impose additional or different requirements." This special procedure is invoked by the filing of a formal complaint or informal letter to which the affected parties may file responsive pleadings. The Commission reserves to itself the right to grant or deny the relief requested with or without a hearing and if a hearing is ordered, to provide for interim relief on the basis of the pleadings.

To the extent that Rule 74.1109 is part and parcel of the licensing system which the Commission has prescribed for CATV operations, it is subject to all of the defects already discussed under Points I and II. However, there is an independent ground for invalidating this rule. It is a veritable freak in the field of administrative law. If the Commission has the power to adopt a rule like 74.1109, the requirements of rule making become meaningless.

As has already been pointed out the Commission in purported compliance with Section 4 of the Administrative Procedure Act and Sections 4(i), 303(f) and (r) of the Communications Act has promulgated detailed rules and regulations governing the operation of CATV systems. One of these rules is 74.1103 which permits, indeed compels, all CATV systems to carry all Grade B signals. Yet pursuant to a request for special relief filed under Rule 74.1109 the Commission has by

interim order in the instant case directed CATV systems to discontinue the carriage of Grade B signals. It did this by reference not to any rule or prescribed standard but pursuant to a vague suggestion in Footnote 69 to the *Second Report and Order* (A. 62) which stated that in rare instances special relief might be required when two or more markets each fall within one another's Grade B contour.[21]

In a recent case—*Vision Cable Company of Rhode Island, Inc.*, 11 Pike & Fischer RR 2d 1096 (1967)—the Commission has pushed its exercise of power to even more extreme limits. In that case the CATV company proposed to initiate service in several Rhode Island communities and to carry on the systems the Grade A signals of the Providence stations and also both Grade A and Grade B signals from Boston and Worcester stations. A Providence television station filed a Petition for Special Relief under Rule 74.1109 asking the Commission to forbid the CATV systems from carrying the television signals of Boston and Worcester stations, Grade A as well as Grade B. The only justification for the relief, as stated in the Commission's opinion, is that the television station "at-

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[21] The full text of Footnote 69 reads as follows:

"If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise."

tempts to demonstrate that, in the areas where Vision Cable proposes to carry the signal of the Boston or Worcester stations, these stations provide predicted signals 'substantially inferior' to the predicted signal which would be provided by proposed UHF Station WNET, Providence." (*id.* at 1098). Station WNET is a non-operating station. It had formerly been on the air but had discontinued operations a long time ago because of economic difficulties. Recently it indicated to the Commission that it intended to return to the air. The Commission felt that the CATV operations could have an effect on WNET's ability to operate. Despite the absence of any rule which would be controverted by the proposed CATV operations (even Footnote 69 does not refer to the overlap of Grade A signals), the Commission issued an interim order summarily ordering Vision Cable to refrain from carrying the Boston and Worcester signals—Grade A as well as Grade B.

The Commission's Rule 74.1109 activities are not limited to Footnote 69 cases. Another instance involved Rule 74.1103. This rule requires CATV systems to provide black-out protection for certain duplicated programs but only where the duplicating program from the distant station is broadcast on the same day as that on which it is broadcast by the protected station. A predecessor rule which was applicable only to microwave-fed systems provided such non-duplication protection if the duplicating programs were broadcast during a 30-day period beginning 15 days before and ending 15 days after the same program was broadcast by the protected station. The Commission had proposed the same rule in its *Notice of Proposed Rule Making* with respect to all CATV sys-

tems. However, after considering the comments filed in the rule making proceeding the Commission in its *Second Report and Order* confined the black-out protection to same day duplication (A. 23-26, 116-118). In *Northern Microwave Service, Inc.*,[22] the Commission had before it CATV systems in northern Maine which had commenced operation at various dates ranging from 1961 to 1965. They carried signals not only from United States television stations but also from Canadian television stations. Canadian television stations originate their own programs and also carry some programs originated by the United States networks. In some cases United States network programs appear on Canadian stations before they are available to the United States television stations. In the cited case, the United States television stations filed a Petition under Rule 74.1109 seeking as special relief a directive that the CATV systems black-out the United States network programs appearing on Canadian stations before they are available to United States stations. The Commission so ordered. There is no substantive provision in any Commission rule providing for such a result. Indeed, the Commission had specifically refused to add such a provision to its Rules preferring instead to retain the unlimited discretion which Rule 74.1109 purportedly gives to it (A. 117-118).

Black Hills has called these cases to the Court's attention not for purposes of seeking a ruling as to the propriety of Commission action in those cases but

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[22] 9 Pike & Fischer RR 2d 647 (1967), *rev'd sub nom. Presque Isle TV Co., Inc.* v. *FCC*, — F. 2d —, 11 Pike & Fischer RR 2d 2072 (1st Cir. 1967).

to illustrate by very concrete examples the nature of the power which the Commission claims to possess pursuant to Rule 74.1109. There is no aspect of CATV operation which lies beyond the ambit of Rule 74.1109. For example, if the Commission's position is correct, it can change the grandfather date of existing systems, it can control the signals that are carried, it can alter the non-duplication protection which must be accorded, etc. Such an assertion of unbridled power makes a mockery of the whole system of administrative law. What need is there to have any detailed rules and regulations if the Commission can promulgate Rule 74.1109? Under the Commission's reasoning it could adopt a very simple rule merely stating that all CATV operation is prohibited except in accordance with such requirements as the Commission may deem to be appropriate on a case-by-case determination on the basis of petitions filed with it by interested persons. All the other Rules are mere window dressing. If the Congress attempted to delegate authority to the Commission to regulate an industry on the basis of such vague standards, serious constitutional questions concerning delegated power would be raised. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Yet that is precisely the type of power which the Commission has attempted to arrogate to itself.

The Congress was very careful in the Communications Act to impose specific standards governing the Commission's conduct and to provide procedural protection to private persons dealing with the Commission. No bestowal of authority in the CATV field has been granted to the Commission by Congress. The Commission deduces from this silence not the usual message, namely, an absence of authority, but rather

the conferring upon it of the power to act in any manner it chooses without standards or procedural safeguards.

CONCLUSION

For the foregoing reasons, it is urged that the judgment of the Court below be affirmed.

Respectfully submitted,

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